DAVID A. PROVINSE

IBLA 84-776 Decided October 4, 1985

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer M 60109.

Affirmed as modified.

David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978), overruled to the extent inconsistent with this decision.

1. Oil and Gas Leases: Discretion to Lease

Where the record or appeal establishes uncertainty of Federal title to a tract of land and its mineral deposits, the appellant has failed to carry his burden on appeal and there is sufficient ground for rejection of an oil and gas lease offer in the exercise of the Secretary's discretionary authority over leasing.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

David A. Provinse appeals from a June 18, 1984, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting noncompetitive oil and gas lease M 60109 for the stated reason that "[t]he oil and gas rights in the land are not owned by the United States."

On February 2, 1984, Provinse filed his offer to lease land described by metes and bounds and located in T. 152 N., R. 104 W., fifth principal meridian, McKenzie County, North Dakota. While the described parcel is presently fast land, it was depicted as part of the the Yellowstone River at its confluence with the Missouri River when the area was surveyed in 1901. Provinse's metes and bounds description follows the meander lines of the filed notes prepared for the 1901 survey plat. According to the record, in 1930 the Yellowstone River opened a new mouth into the Missouri River about one mile to the east of the mouth shown on the 1901 survey plat. The water in the old channel eventually dried up. BLM held in its decision that ownership of the lands formerly in the riverbed described by Provinse was vested in the State of North Dakota. It relied upon a May 15, 1984, BLM memorandum

which concluded the shift in the river was avulsive and that, applying the doctrine of avulsion, ownership was found to be in the State. 1/

In his statement of reasons, Provinse contends the lands in question accreted to the right, or east, bank of the Yellowstone River at a time when the United States was the riparian landowner. He argues that, as a result of such accretion, the United States has full title in the land for which an oil and gas lease can be issued. In support of his position, Provinse submits several maps and photographs. The following are excerpts from his explanation of those exhibits:

> Attached as EXHIBIT "A" to this statement is a copy of Plate LX of a survey of the Missouri River published by the

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1/ The relevant portion of this memorandum, transmitted from the Chief, Branch of Cadastral Survey to Chief, Fluids Adjudication Section, Montana State Office, BLM, and enclosed with the June 18, 1984, decision, reads as follows:

"Avulsion is the rapid, perceptible, unusual catastrophic change in the course of a body of water ordinarily moving as a stream or river. Avulsion quite often occurs where in the course of accretion, a curve in the river's course would become so acute as to form an ox-bow and during a period of high water, the river will break through and cut off the neck of the convex shore and abandon the old bed in the ox-bow. Time is not always the primary determination factor in cases of avulsion. Even though the records show a 28 year gap in the history of the river, portions of the land between the old and new channels remain substantially as they were, notwithstanding the limited effects of accretion and erosion within the area of the avulsive change. All the facts point to the doctrine of avulsion as applying in this case, specifically the abandoned bed of the Yellowstone River described in lease offer M 60109 was caused by an avulsive action.

"'Upon the admission of a State into the Union, title to the beds of navigable bodies of water inures to the State as an incident of Sovereignty. In Pollard's Lessee v. Hagan, 44 U.S. 212 (1844), the Supreme Court held [at 230] that: "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."' 7-47 Manual of Surveying Instructions, 1973. In 7-75 Manual of Surveying Instructions, 1973, the manual states that 'The bed of a new channel resulting from avulsion continues to belong to the owner of the land encroached upon. The bed of the former channel continues to belong to the riparian owners if the stream is nonnavigable. Ownership of the abandoned bed of a navigable stream is governed by State law.'

"Due to portions of erosion and accretion along the shores of the river since the Dike survey and prior to the avulsion, the metes and bounds description of the lease offer does not follow the present abandoned channel, but even if it did, the ownership of the abandoned channel is vested in the state, and the Federal Government would have no jurisdiction in this case."

Missouri River Commission in 1984 and based on a survey made in 1891. EXHIBIT "A" shows the Missouri River forming a narrow necked ox-bow at the point of confluence with the Yellowstone. The Yellowstone River has made a sweeping curve and is flowing in a westerly direction when it joins the Missouri and the combined rivers then flow to the north. * * * It would appear that in the time between the 1891 mapping by the Missouri River Commission (EXHIBIT "A") and the 1901 Dike Survey (EXHIBIT "B") the Missouri River had cut through the narrow neck ox-bow shown on the 1894 map and left a dry channel. This dry channel is set out on the Dike survey in Sections 29, 32 and 33 (EXHIBIT "B").

In April and May of 1910 the U.S. Army Corps of Engineers made a survey of the Yellowstone River from Glendive to its mouth. Sheet No. 11 of this survey covers the confluence area involved in this appeal and is included as EXHIBIT "C" to this statement. * * * An examination of the two maps [Exhibits B and C] shows that the Yellowstone River is in approximately the same position on both maps as it flows across Sections 22 and 27 in the first sweeping curve; however, in the second curve the channel has shifted to the south and the west into the dry channel of the Missouri River. This shift brought the right bank of the Yellowstone River south into Section 33 and caused the Yellowstone to invade the northeast corner of Section 32.

As mentioned earlier in this statement, the break through of the Yellowstone River into the Missouri River to form its present confluence occurred in 1930. Submitted herewith are EXHIBIT "D" and EXHIBIT "E" which establish that the break through occurred during the last week of June in 1930. EXHIBIT "D" is a map passed out by the North Dakota Historical Society at the Fort Buford Historic Site which shows the confluence to have been established in 1930. EXHIBIT "E" is a copy of Page 2 from the July 1, 1930 issue of the Williston Herald, a daily published in Williston, North Dakota. Under the news from the Buford-Marley area the following item appears:

> The Yellowstone River cut a new channel through the point on the McKenzie County side the past week and left a good sized island between it and the Missouri. The Yellowstone now empties into the Missouri right south of Buford or just opposite where the reclamation stood.

The reference to the good sized island would indicate that sufficient water remained in the old channel to establish an island.

Aerial photography of the area to the confluence of Yellowstone and Missouri Rivers has been taken at regular intervals

since the late 1930's. The following aerial photos of the area are included as exhibits to this statement:

EXHIBIT "F" -- Aerial photo dated 7/26/39
EXHIBIT "G" -- Aerial photo dated 8/20/49
EXHIBIT "H" -- Aerial photo dated 8/1/58
EXHIBIT "I" -- Aerial photo dated 7/17/74
EXHIBIT "J" -- Aerial photo dated 9/6/82.

So that the sections pertinent to this appeal can be easily identified, appellant has drafted in a township grid on each of these aerial photos.

Your attention is called to EXHIBIT "F" which is the 7-26-39 aerial photo of the area involved. * * * All that remains of the old channel of the Yellowstone River is a shallow U-shaped lake that has shifted to the south and west of the channel as originally surveyed by Dike. The remaining lake establishes the location of the Yellowstone River just prior to the time it established its new mouth in June of 1931 [sic]. Since the main flow of the Yellowstone River would be through its new mouth after June of 1930, little erosion would have occurred along the old channel. As is evident from EXHIBIT "F" most of the bed of the Yellowstone River described by lease offer M 60109 was dry land when the new mouth was established * * *.

In the Branch of Cadastral Survey memorandum of May 15, 1984, mentioned previously a reference was made to the Yellowstone River Erosion Control Demonstration Program Intake, Montana to Mouth, Composites of Historical River Location 1978, 1965, 1951, 1938 published in March 1979 by the U. S. Army Corps of Engineers. River Reach No. 6 from this series of composites was used by the Branch of Cadastral Survey to establish that in 1938 the Yellowstone River had broken through an ox-bow to establish a new mouth [Exhibit "K"] * * *.

* * * It would appear that the composite of river locations set out in EXHIBIT "K" was drawn from the figures in this Background Study. Attached hereto as EXHIBITS "L-1" through EXHIBIT "L-7" are pertinent figures from this Background Study. EXHIBIT "L-1" is a list of all the figures in the study and EXHIBIT "L-2" through EXHIBIT "L-7" are all of the figures which cover the area designated as River Reach No. 6. These figures from the Background Study clearly support Appellant's contention that the lands included in lease offer M 60109 were lands accreted to the right bank of the Yellowstone River at the time a new mouth was established at its confluence with the Missouri. A comparison between the 1901 River (EXHIBIT "L-2") and the 1938 River (EXHIBIT "L-3") clearly shows the shift of the channel to the south and west * * *.

> In Appellant's opinion the foregoing EXHIBITS establish the fact that the original channel of the Yellowstone River shifted to the south and west subsequent to the 1901 Dike survey resulting in lands accreted to the right bank of the Yellowstone River.

Through his exhibits labeled "M" through "P," Provinse shows the public lands adjacent to the parcel in question were not patented until after the Yellowstone River had shifted in June 1930. 2/ He argues that title to accretions attaching to the riparian lands, occurring during their status as public domain, vested in the United States and the accreted land was not granted by subsequent patents identified.

[1] The current public land plat for T. 152 N., R. 104 W., fifth principal meridian, shows the area described by Provinse was at the time of the 1901 survey part of the riverbed of the Yellowstone River near its confluence with the Missouri River. This portion of the Yellowstone River is recognized as a navigable stream. See David A. Provinse, 78 IBLA 85 (1983); Leonard R. McSweyn, 28 IBLA 100, 83 I.D. 556 (1976). Under the "equal footing doctrine" enunciated in Pollard's Lessee v. Hagan, 15 U.S. (3 How. 212, 391 (1844)), title to the beds of navigable bodies of water indefeasibly vested in the State as an incident of sovereignty at the time of its admission to the Union. Montana v. United States, 450 U.S. 544, 551 (1980); Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Leonard R. McSweyn, supra. See also Summa Corp. v. California ex rel. State Lands Commission, ___ U.S. ___, 104 S. Ct. 1751 (1984). The State of North Dakota was admitted in 1889 and, therefore, the riverbed of the Yellowstone River at its confluence then vested in the State. Provinse's arguments concerning ownership follow general principles that a state's title to the beds of a navigable stream within its boundaries will follow imperceptible changes in the rivercourse: Title to accretions wrought by such changes will vest in the riparian landowner. See 65 C.J.S. Navigable Waters §§ 80-93 (1966); 93 C.J.S. Waters §§ 71-80 (1956); 78 Am. Jur. 2d Waters §§ 406-427 (1975). BLM, however, has applied principles of the common law of avulsion to the facts. See id.; note 1, infra. What constitutes an avulsion or accretion is a question of law; and whether either occurred at a certain time and place is a question of fact. 65 C.J.S. Navigable Waters § 86c (1966). Both BLM's decision and appellant's resolution of the situation, however, wrongly apply these general rules of law. The choice of which law to apply, state or federal, is first required to be made. A recent decision of the United States Supreme Court changes past approaches to this question.

2/ Appellant's exhibits identified these patents as grants of the former riparian lands depicted in the 1901 survey:

Patent No.	Date of Patent	Date of Entry
1074169	Jan. 30, 1935	Aug. 4, 1930
1105006	Sept. 19, 1939	Jan. 2, 1934
1114133	June 8, 1942	June 23, 1919
1117948	Feb. 25, 1944	Nov. 13, 1939
1119254	Dec. 12, 1944	Jan. 5, 1939
1146474	Sept. 3, 1954	Apr. 22, 1937
1148113	Nov. 23, 1954	July 10, 1947

In David A. Provinse, 35 IBLA 221, 227-30, 85 I.D. 154, 157-58 (1978), the Board reviewed an appeal involving a similar situation and determined that Federal law should be applied. The Supreme Court in Oregon v. Corvallis, supra, sharply limited the applicability of Federal law in determining the effect on titles the movement of rivers might have by holding the disputed ownership of the bed of a navigable river should be decided solely as a matter of state law. The Corvallis opinion relied upon the state's indefeasible title in the riverbed to overturn its earlier decision in Bonnelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), in which the Court applied Federal common law as the governing standard. However, the Court in Corvallis, supra at 371, also recognized that Federal law should be applied if "there were present some other principle of Federal law requiring state law to be displaced." This was the authority relied upon by the Board in Provinse when it applied Federal law. The Court also acknowledged and applied the Corvallis exception in California ex rel. State Lands Commission v. United States, 457 U.S. 273, 281 (1982), where it was concluded "that a dispute over accretions to oceanfront land where title rests or was derived from the Federal Government is to be determined by federal law." The Court's holding indicates title affected by watercourses bordered by riparian or littoral lands held by the United States is governed by Federal law. However, a review of the Court's holding in California shows the decision is reasoned upon this language found in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 670 (1979): "The general rule recognized by Corvallis does not oust federal law in this case. Here, we are not dealing with land titles merely derived from the federal grant, but with land with respect to which the United States has never yielded title or terminated its interests." Quoted in California v. United States, supra at 282. Scrutiny of the Wilson decision reveals this language was a reiteration of the Court of Appeals decision which was vacated by the Supreme Court decision. Wilson v. Omaha Indian Tribe, supra at 670. The issue in the Wilson decision was the effect of accretive or avulsive changes in the course of a navigable stream where state boundaries are not involved. When reviewing this combination of factors, the Court commented:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States * * * have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal law. * * * [W]e discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute.

Id. at 673. The Wilson Court ultimately held that state law was the controlling rule in determining the effect of changes in the watercourse at issue. Id. at 679. We find the same factors are present in the case at issue, i.e., a navigable stream where the riparian lands do not involve an interstate boundary. We therefore conclude, based on Wilson v. Omaha Indian Tribe, that state law should be applied here.

The position of North Dakota law regarding the effects of changes in navigable streams is summarized by Judge Teigen in his special concurring opinion found in Perry v. Erling, 132 N.W. 2d 889, 899-900 (1965):

> When North Dakota became a State, it adopted several territorial statutes which are still in force providing for methods of disposition of the beds of navigable streams. These statutes provide that where a navigable stream forms a new course abandoning its ancient bed, the owners of the land newly occupied take by way of indemnity the ancient bed abandoned, each in proportion to the land of which he has been deprived (Section 47-06-07, N.D.C.C.); that islands and accumulations of land formed in the beds of streams which are navigable belong to the State, if there is no title or prescription to the contrary (Section 47-06-08, N.D.C.C.); that where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank (Section 47-06-05, N.D.C.C.); and that except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark, provided, however, that all navigable rivers shall remain and be deemed public highways (Section 47-01-15, N.D.C.C.). [3/, 4/]

3/ The first three statutes cited by Judge Teigen are set forth in full as they appear in Volume 9A, North Dakota Century Code (The Allen Smith Company, 1978):

"47-06-05. Riparian accretions.--Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

"47-06-07. Ancient stream bed taken by owners of new course as indemnity.--If a stream, navigable or not navigable, forms a new course abandoning its ancient bed, the owners of the land newly occupied take by way of indemnity the ancient bed abandoned, each in proportion to the land of which he has been deprived.

"47-06-08. Islands and relicted lands in navigable streams belong to state.--Islands and accumulations of land formed in the beds of streams which are navigable belong to the state, if there is no title or prescription to the contrary. The control and management, including the power to execute mineral leases, of islands, relictions and accumulations of land owned by the state of North Dakota in navigable streams and waters and the beds thereof, shall be in the board of university and school lands. All income and proceeds derived from such lands shall be deposited in the general fund for the purpose of defraying the general expenses of the state government. This section shall not be construed as affecting or changing the provisions of any contract already executed by or on behalf of the state of North Dakota or any department or agency thereof concerning such lands and shall not apply to lands within the Garrison diversion conservancy district."

4/ By comparison the state of the Federal law was summarized by the Board in David A. Provinse, 35 IBLA at 231, 85 I.D. at 159:

As appellant correctly points out, BLM's description of the river's movement does not strictly coincide with its conclusion that title to the fast land sought in the lease offer was absolutely vested in the State. While BLM identified the river's abandonment of its channel in 1930 as "avulsive," it also declares that "[d]ue to portions of erosion and accretion along the shores of the river since the Dike [1901] survey and prior to avulsion, the metes and bounds description of the lease offer does not follow the present abandoned channel." See May 15, 1984, Memorandum found at note 1. The North Dakota statute governing "avulsion," N.D. Cent. Code, § 47-06-06 (1943), does not include the abandonment of the former riverbed within its definition of that term. However, under separate provision, the State has established guidelines in the event a navigable stream abandons its channel and adopts a new course. N.D. Cent. Code, § 47-06-07 (1943). A feature of this statute is that it is not governed by special qualifiers like "sudden" or "rapid" found in the laws of other jurisdictions associated with this type of situation. See 65 C.J.S. Navigable Waters § 86(a) (1966); Robert E. Beck, Boundary Litigation and Legislation in North Dakota, 43 N.D.L. Rev. 424, 450-51 (1965).

It is apparent the Yellowstone River changed its course and ceased as a primary water body to occupy the area in question. As the remaining waters eventually dried up, the former riverbed was exposed and became fast lands. See Exhs. G through J. Under the pertinent state laws, the emerging fast lands should have been allocated as indemnification to the owners of the land inundated by the new rivercourse. N.D. Cent. Code § 47-06-07 (1943). However, it is Provinse's primary argument that the land described in his lease offer did not constitute part of the former river channel to be allocated but is identifiable as accretion to the riparian lands. This assertion does not conflict with the memorandum upon which the BLM decision is based.

Review of the 1939 aerial photograph (Exh. F) supports appellant's argument that the channel of the Yellowstone River in the area at issue had

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fn. 4 (continued)

"Federal law follows the common law in recognizing the distinction between accretion and avulsion. Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Nebraska v. Iowa, 143 U.S. 459 (1892); Forest Oil Corporation, [15 IBLA 33 (1974)]; Palo Verde Color of Title Claims, 72 I.D. 409 (1965). Title to accreted land inures to the upland owner. Id. Avulsion is the sudden perceptible shifting of the course of a stream or river. In the case of avulsion, title to avulsed land is not lost by its former owner nor does it accrue to the owner of what was formerly the opposite bank. Id." This conflict-of-law principle is ignored by the concurring opinion, which would apply the "Basart exception" and the holding in Eldin R. Johnson, 82 IBLA 135 (1984), appeal pending sub nom., Johnson v. Clark, Civ. No. A 4-84-215 (D.N.D. filed Oct. 4, 1984) to this case. The Basart exception, however, applies only in cases where Federal law is to be applied. It has no application in this case, where state law applies. See Wilson v. Omaha Indian Tribe, supra.

migrated south and west before the river abandoned the channel for its present confluence with the Missouri River. Other evidence presented by appellant strongly suggests that by June 1930 a considerable quantity of fast land had emerged between the east bank depicted in the 1901 survey and the migrating river channel. Appellant characterizes the new land as accretion to the former east bank. BLM's memorandum also recognizes erosions and accretions caused by the river before its final change in course. Under N.D. Cent. Code § 47-06-05 (1943), the riparian owner is entitled to such emerging land where the effects of the river's movement are imperceptible. Accordingly, accretions should be imperceptibly affixed to riparian lands before they can be claimed as a part thereof. The strongest evidence supporting appellant's claim that the river had migrated, the 1910 Corps of Engineer's survey map (Exh. C), also shows that part of the land at issue had emerged from the river but was not attached to the riparian lands of the east bank. Instead, the land was separated as an island by a small arm of the Yellowstone River in its downstream flow to the Missouri River. This distinction vaguely appears on subsequent aerial photographs. As a consequence of this feature, the fast land would not qualify as an imperceptible addition to the riparian bank. An island created by either accumulation of materials or recession of water would be governed by N.D. Cent. Code, § 47-06-08 (1943), which provides that islands and relicted lands in navigable streams belong to the state. See David A. Provinse, 78 IBLA at 90. The island would have been Federal land only if it originally accreted to the riparian bank and was later separated by action of the river. See N.D. Cent. Code, § 47-06-10 (1943). However, evidence establishing such a possibility has not been presented.

The remaining land in Provinse's lease offer appears to have constituted part of the riverbed immediately before the river changed its course in 1930. As was earlier pointed out, the riparian owner is not afforded an interest in an abandoned channel by North Dakota law.

It cannot be concluded with certainty, as appellant proposes, that the land at issue here can be identified as accretions to riparian Federal lands to which the United States should be entitled. 5/ Moreover, the official land plat for this land does not indicate the United States has acknowledged its title to this land by any other method of acquisition. This Board has held that uncertainty regarding the status of mineral deposits is sufficient grounds for rejection of a lease offer in the exercise of the Secretary's authority over leasing. Lee E. McDonald, 68 IBLA 272 (1982); Forest Oil Corp., supra. See also 30 U.S.C. § 226(a) (1982); Udall v. Tallman, 380 U.S. 1 (1965). Where title to a tract of land which is the subject of an oil and gas lease offer is in doubt, the burden is on the applicant to establish the eligibility of the tract for leasing. Id. In the absence of evidence presented by Provinse to show the land in question is public land, we affirm BLM's decision rejecting his lease offer M 60109.

5/ The dissenter points out, essentially, that appellant has failed to prove his case, as was incumbent upon him to do. This circumstance does not require a hearing, but rather a rejection of his offer. See Lee E. McDonald, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

89 IBLA 163

ADMINISTRATIVE JUDGE GRANT CONCURRING IN THE RESULT:

I concur with the conclusion in this case that uncertainty as to the title to the land described in appellant's lease offer justifies affirming the decision below. However, I believe we must acknowledge that appellant is arguing for the application of a doctrine known as the "Basart exception." 1/ See Eldin L. R. Johnson, 82 IBLA 135 (1984). 2/ As a general rule, the surveyed meander line of a patented tract riparian to a stream is regarded not as a boundary line, but rather an effort to trace the sinuousity of the shoreline for purposes of calculating the acreage of the tract. Under the Basart exception to this rule, the surveyed meander line will be treated as the boundary of a patented tract of riparian land if a large body of land had accreted to the tract after the time of survey and prior to the entry of the tract by the patentee. Eldin L. R. Johnson, supra. Appellant contends that accretion to the surveyed riparian tracts after survey and prior to entry and patent of the lands caused title to the accretion to remain in the United States after patent under the Basart exception. Indeed, appellant is alleging a case arguably similar to Eldin L. R. Johnson, supra, which involved land on the same river only two townships distant.

I do not find the case of Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), to be dispositive of the law to be applied here. The Wilson Court recited the general rule to the effect that when the question is whether title to land owned by the United States has passed, the issue must be resolved by the laws of the United States, whereas after title has passed, the subsequent disposition of the property is a question of state law. 442 U.S. at 669-70. After noting that application of this rule to that case did not oust Federal law as title to the land at issue was still held in trust by the United States for the Indians, the Wilson Court went on to hold:

> Although we have determined that federal law ultimately controls the issue in this case, it is still true that "[c]ontroversies * * * governed by federal laws, do not inevitably require resort to uniform federal rules * * *. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" [Citations and footnote omitted.]

442 U.S. at 671-72. After considering whether there is a need for a uniform national body of law on the issue, whether application of state law would

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1/ The rule takes its name from the case of Madison v. Basart, 59 I.D. 415 (1947), where the exception was stated.

2/ Appeal filed, Johnson v. Clark, No. A4-84-215 (D. N.D. Oct. 4, 1984).

frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law, the Wilson Court concluded that "state law should be borrowed as the federal rule of decision."
442 U.S. at 673.

I do not believe the Wilson decision alters the application of federal law to determine the question of what land was conveyed by the patent--whether the accretions existing at the time of entry were embraced in the patent.

However, as pointed out by the main opinion in this case, the evidence leaves substantial doubt as to several issues relevant to title including the extent of the land accreted to the tracts at the time of entry and at the time of the subsequent avulsive change and whether part of the land described in the offer was an island which arose from the bed of a navigable river. I do not believe either the United States or the parties claiming title should be put to the expense of holding a hearing, conducting a supplemental survey, and doing whatever else is required to resolve the question of title at the behest of a noncompetitive oil and gas lease offeror. A decision rejecting a noncompetitive oil and gas lease offer is properly affirmed where there is significant doubt as to the existence of title in the United States. See Lee E. McDonald, 68 IBLA 272 (1982).

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C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The 1901 Dike survey of T. 152 N., R. 104 W. (Exh. B), shows the Yellowstone River flowing to the west across most of the southern portion of sec. 28 and then turning north, occupying approximately the W 1/2 NW 1/4 of sec. 28 and the E 1/2 NE 1/4 of the section as it joins the Missouri River. The 1910 Corps of Engineers survey (Exh. C) shows land in most of the S 1/2 SW 1/4, the NW 1/4 SW 1/4, and the W 1/2 NW 1/4 of sec. 28 and the Yellowstone River flowing north in the E 1/2 SE 1/4 and E 1/2 NW 1/4 of sec. 29. Provinse reasons that the "U-shaped lake" shown on the 1937 aerial photograph of the new confluence of the two rivers formed in 1930 (Exh. F) indicates the course of the Yellowstone River had moved even further to the south and west by 1930 than it had by 1910 and that therefore the lands to the north and east that were shown as bed of the Yellowstone River on the Dike survey and are covered by his offer were formed by accretion. The Bureau of Land Management, however, asserts: "All the facts point to the doctrine of avulsion as applying in this case, specifically the abandoned bed of the Yellowstone River described in lease offer M 60109 was caused by an avulsion action." Memorandum of May 15, 1984, from Chief, Branch of Cadastral Survey to Chief, Fluids Adjudication Section.

The problem, of course, is that there are no more relevant "facts" in the record than the 1901 and 1910 surveys and the 1937 aerial photograph. Obviously, these facts are subject to different interpretations. In a similar case where there was "limited survey information and a lack of expert evidence of record" we ordered a hearing to determine when land in this vicinity was formed. Eldin L. R. Johnson, 47 IBLA 366 (1980). Alternatively, if the Department does not want to make the effort of determining how the lands involved were formed and whether they were attached to the upland lots, it could issue a lease to the applicant subject to the understanding that the United States makes no warranty of title to the mineral rights and assumes no obligation to defend the lease. See Georgette B. Lee, 5 IBLA 295, 297 (1972).

Will A. Irwin
Administrative Judge